COPY

IN THE

Supreme Court of the United States

October Term, 1959.

No. 92

MICHAEL FORD,

Appellant,

v.

ATTORNEY GENERAL OF PENNSYLVANIA, DISTRICT ATTORNEY OF SCHUYLKILL COUNTY, SHERIFF OF SCHUYLKILL COUNTY, and SERGEANT IN CHARGE OF PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Appellant.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement	4
The Questions Are Substantial	6
Appendix A	1a
Opinion of the United States District Court for the Eastern District of Pennsylvania (Three Judge Court), and Order	1a, 9a
Findings of Fact, Discussion and Conclusions of Law of the United States District Court for the Eastern District of Pennsylvania (Single Judge)	11a
Opinion of the United States Court of Appeals for the Third Circuit	14a
Appendix B—Text of Statutes Involved	16a

CITATIONS.

Cases

	Page
Bell v. Hood, 327 U. S. 678	7
Daniel v. Family Security L. Ins. Co., 336 U. S. 220, 224	6
Florida Lime & Avocado Growers, Inc. v. Jacobsen, — U. S. —, 4 L. ed. 2d 568	2, 6
Georgia R. & Bkg. Co. v. Redwine, 342 U. S. 299, 302	6, 9
Hynes v. Grimes Packing Co., 337 U. S. 86	9
In re Return of Trombetta, 188 Pa. Super. Ct. 480, aff'd 397 Pa. 430	4, 7, 9
Id., dissenting opinion, at page 445	8
Lanzetta v. New Jersey, 306 U. S. 451	8
Morey v. Doud, 354 U. S. 457	10
Query v. United States, 316 U. S. 480, 490	2, 6
Sterling v. Constantin, 287 U. S. 378, 393-394	6
Stratton v. St. Louis S. W. Ry Co., 282 U. S. 10	6
Urban's Appeal, 148 Pa. Super. Ct. 101	10
Wigton's Return, 151 Pa. Super. Ct. 337	7, 10
Winters v. New York, 333 U. S. 507	8

Statutes.

	Page
United States Constitution, Fourteenth Amendment	2, 3, 5, 8, 9
United States Code, Title 28:	
Section 1253	2
Section 1343	2
Section 2281	2, 5, 6
Section 2284	5, 6
[Pennsylvania] Act of March 31, 1860, P. L. 382, Section 60, 18 P. S. Section 1445	2, 3, 4, 5, 6, 7, 9
[Pennsylvania] Act of June 24, 1939, P. L. 872, Section 605, 18 P. S. Section 4605	2, 5, 8, 9

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

MICHAEL FORD,

Appellant,

v.

ATTORNEY GENERAL OF PENNSYLVANIA, DISTRICT ATTORNEY OF SCHUYLKILL COUNTY, SHERIFF OF SCHUYLKILL COUNTY, AND SERGEANT IN CHARGE OF PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the United States District Court for the Eastern District of Pennsylvania (three-judge District Court) entered on May 23, 1960, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (three-judge court) is not reported. Opinion of the United States Court of Appeals for the Third Circuit is reported at 274 F. 2d 820. Findings of Fact and Conclusions of the single judge district court is not reported. Copies of these are attached hereto as Appendix A.

JURISDICTION.

This action was brought under 28 U. S. C. Sections 1343 and 2281, and the Fourteenth Amendment to the United States Constitution to restrain appellees, officials of or under the Commonwealth of Pennsylvania, from unconstitutionally seizing and confiscating his property and causing his arrest. The judgment of the three-judge District Court was entered on May 23, 1960, and notice of appeal was filed in that Court on the same day. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. Section 1253. The jurisdiction of the Supreme Court to review the judgment on direct appeal is sustained in *Florida Lime and Avocado Growers v. Jacobsen*, — U. S. —, 4 L. Ed. 568 (March 7, 1960); see also, *Query v. United States*, 316 U. S. 480, 490 (1959).

STATUTES INVOLVED.

Section 1 of the Fourteenth Amendment to the United States Constitution; Pennsylvania Act of March 31, 1860, P. L. 382, Section 60, 18 P. S. Section 1445, and Pennsylvania Act of June 24, 1939, P. L. 872, Section 605, 18 P. S. Section 4605, are set out verbatim in Appendix B.

QUESTIONS PRESENTED.

1. Whether the three-judge District Court properly relinquished its jurisdiction in respect to that portion of the complaint which alleged the unconstitutionality of Pennsylvania Act of March 31, 1960, P. L. 382, Section 60, 18 P. S. Section 1445.

2. Where officials purporting to act pursuant to laws of the Commonwealth of Pennsylvania have threatened forthwith to seize single coin pinball machines owned by appellant and to cause his arrest, and the machines are of a kind which have not previously been held illegal in Pennsylvania, it being the declared object of the said officials to test their legality by seizure, primarily because they have been converted from, and might be reconverted to, machines of a type which, without proof of their use for gambling have been held to be illegal *per se*,

(a) are not the Pennsylvania statutes which, as applied, permit seizure and confiscation of property which might be used for gambling, and make it a crime for anyone to set up any game at which money *may* be played for, repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution?

(b) is not the appellant entitled to restrain the enforcement of such statutes where the state law does not provide a remedy to determine the legality of his property prior to seizure, and where by reason of such seizure his business will be destroyed and he will be subjected to criminal prosecution?

STATEMENT.

Appellant commenced this action in the Court below to restrain the appellees, officials acting under color of the laws of the Commonwealth of Pennsylvania, from seizing his property and causing his arrest.

The Complaint has not yet been answered by the appellees. It alleges that appellant is the owner of certain pinball machines[1] which he leases to storekeepers in Schuylkill County, Pennsylvania; that these machines are duly licensed as amusement devices by the federal government; that they were converted to single coin operation from multiple coin operation following the decision of the Pennsylvania Supreme Court in *In re Return of Trombetta*, 397 Pa. 430, affirming *per curiam* (two Justices dissenting) 188 Pa. Super. Ct. 480; that in order to test the legality of these machines, the appellees threaten forthwith to seize and confiscate them as gambling devices *per se* pursuant to Section 60 of the Pennsylvania Act of March 31, 1860, P. L. 382, 18 P. S. Section 1445, and threaten appellant with criminal prosecution pursuant to Section 605 of the Pennsyl-

1. The machines involved are of a type whereby a coin is inserted to obtain a number of steel balls. The steel balls may be propelled by use of a calibrated plunger onto a playing field through a maze of pins and fall into holes scattered on the field or into a slot at the bottom of the field. Lights are illuminated on a vertical board at the head of the field when a ball comes to rest in a hole. The score is registered on the vertical board and is determined by the pins struck and by the number of balls deposited in the holes and the position of the holes filled by the balls. Certain scores entitle the player to free games. In a multiple coin machine, but not a single coin machine, additional coins may be inserted by a player to obtain an additional ball and he may also change his opportunities to secure higher scores and free games. The machines are equipped with a counting device that shows the number of free games achieved, and this is usually shown on the vertical board; a device, called a "knock-down" button, to cancel free games shown but left unused by a player in order to clear the machine for use by a subsequent player; and a device inside the machine that registers the total number of games played (free and paid) and the number of free games cancelled.

vania Act of June 24, 1939, P. L. 872, 18 P. S. Section 4605; that these statutes as applied are violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; that his business will be destroyed and he will be subjected to criminal prosecution unless the appellees are restrained; and that such restraint should be granted by the Court.

A preliminary hearing was had before a single district judge. At this hearing, it was conceded by counsel for appellees that it was appellees' intention to seize appellant's property here involved to test the legality of the machines, per se, without evidence that they are in fact employed in gambling. The District Judge, upon findings of fact and conclusions of law, issued a preliminary injunction. On appeal, the Court of Appeals for the Third Circuit dissolved the injunction on the ground that the matter was one for a three-judge district court. 274 F. 2d 820.

Thereafter, appellant moved to constitute a three-judge district court, pursuant to 28 U. S. C. Sections 2281 and 2284, and such Court was convened. In the course of the proceedings before the three-judge District Court, appellant offered to permit appellees to seize one machine to establish a test case under the Pennsylvania law, but such offer was rejected. On May 23, 1960, the three-judge District Court issued its Opinion and the order from which this appeal is taken. It "relinquished" jurisdiction with respect to that portion of the case having to do with the constitutionality of Section 60 of the Act of March 31, 1860, P. L. 382, 18 P. S. Section 1445, on the ground that it could find no substantial federal question. Such relinquishment was premised on the theory that a single district judge to whom an application is made to convene a three-judge district court may dismiss the complaint on the ground that it presents no substantial federal question. With respect to Section 605 of the Act of June 24, 1939, P. L. 872, 18 P. S. Section 4605, the three-judge District Court found that a substantial federal question was presented in that the statute which makes it a crime

to set up any game at which money may be played for, could well be too vague and indefinite to be enforced against the plaintiff. However, the Court denied equitable relief on the ground that appellant's rights would be protected in any criminal proceeding instituted against him under Section 605 in the state courts.

THE QUESTIONS ARE SUBSTANTIAL.

1. The three-judge District Court was convened pursuant to 28 U. S. C. Sections 2281 and 2284. Since the complaint attacks the constitutional validity of state statutes as applied, it is clear that such court was properly convened. *Sterling v. Constantin*, 287 U. S. 378, 393-394; *Stratton v. St. Louis S. W. Ry. Co.*, 282 U. S. 10. That unconstitutionality is asserted against the statutes *as applied* does not remove the case from the jurisdiction of a three judge district court. *Query v. United States*, 316 U. S. 480, 490; *Daniel v. Family Security L. Ins. Co.*, 336 U. S. 220, 221; *Georgia R. & Bkg. Co. v. Redwine*, 342 U. S. 299, 302.

In relinquishing its jurisdiction with respect to that portion of the controversy relating to Section 60 of the Act of March 31, 1860, P. L. 382, 18 P. S. Section 1445, the court below acted inconsistently with the recent decision of this Court in *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, — U. S. —, 4 L. Ed. 2d 568, wherein it was expressly held that a three-judge district court had jurisdiction over and should dispose of all issues raised where they are joined with issues which require the convening of such a court.

The court below left it to a single judge to act with respect to the controversy concerning Section 60, but apparently on the assumption that such single judge would dismiss the complaint. In that event, appeal would lie to the Court of Appeals, which has already expressed the view that the issue is within the competence of a three judge district court. 274 F. 2d 820.

Since the jurisdiction of the court below is apparent, it should have proceeded to disposition of the controversy. Cf. *Bell v. Hood*, 327 U. S. 678. And there seems to be no reason of policy of procedure for the additional legal complications and expense which result from the action of the Court below.

It is submitted that the decision of the Court below raises serious problems of judicial administration and in the operation of statutory three-judge district courts which require the attention of and resolution by this Court.

2. Section 60 of the Act of March 31, 1860, 18 P. S. Section 1445, provides for the seizure, and after hearing, for the condemnation and destruction of any device or machine of any kind, character or description whatever, used and employed for the purposes of unlawful gaming. The authority to destroy such property is limited to cases in which the court is satisfied that such device or machine was employed or used for the purpose of unlawful gaming. Pennsylvania courts have held that devices which could only be used illegally are *per se* gaming devices within the meaning of this statute; thus, slot machines and other devices which are coin operated and automatically return money or a prize are *per se* within this statute. But single coin pinball machines which allow free games for high scores have been held legal, absent evidence that a player who wins free games is paid in money or property. *Wigton's Return*, 151 Pa. Super. Ct. 337. However, in *In re Return of Trombetta*, 188 Pa. Super. Ct. 480, affirmed *per curiam*, two Justices dissenting, 397 Pa. 430, it was held that multiple coin pinball machines are illegal *per se*, because of the multiple coin feature, on the theory, for the first time applied to Section 60, that the machines might or could be used for gambling.

It is the position of the appellant that in accordance with the application of Section 60 by the *Trombetta* decision, to the extent that it condemns a class of property which might or could be used for gambling, it is vague and

indefinite and fails to identify the property subject to destruction. Men of common intelligence must necessarily guess at its meaning and differ as to its application. One cannot comply with the law as so construed and applied, and as so construed and applied it is an unreasonable exercise of the state's police power. Under well accepted principles, a statute so applied is repugnant to the Fourteenth Amendment to the Federal Constitution. Cf. *Winters v. New York*, 333 U. S. 507; *Lanzetta v. New Jersey*, 306 U. S. 451.

As stated by Pennsylvania Supreme Court Justice Musmanno in his dissent in the *Trombetta* case, 397 Pa. at page 445:

> "The Majority says that the pin ball machines in this litigation are gambling devices but it fails to specify how and why they are gambling devices, which subjects them to execution. The record utterly fails to show that these machines were ever used for gambling. We thus come to the inevitable conclusion that the Majority has, after a certain amount of technological discussion, arbitrarily condemned them to destruction. I believe that the owners and lessees of similar machines throughout the Commonwealth are entitled to know wherein the machines are illegal and this explanation should be given, in language which will enable them to make such adjustments as will bring the pin ball machines (which are intrinsically harmless) into the realm of legality. The proprietors of five million dollars worth of private property are entitled at least to this. Because the Opinion of this Court does not do this, I must dissent."

The Court below recognized that to the extent Section 605 of the Act of June 24, 1939, 18 P. S. Section 4605, makes it a crime for anyone to set up any game at which money may be played for, it is too vague and indefinite to be enforced against the appellant, and that therefore a sub-

stantial federal question is raised in this proceeding. However, there is no essential difference between Section 60, as applied by the Courts of Pennsylvania, and the express terms of Section 605, since the application under either act is the same, the difference being that the former works *in rem* against the property and the latter *in personam* against the owner.

3. In the proceedings below, it was conceded by the Attorney General of Pennsylvania, through her Deputy, that it is the desire of that officer to test the legality of the appellant's machines. This is virtually a confession of the correctness of appellant's contention here. Moreover, that officer has rejected the offer of appellant to make one machine available for this purpose. Under the law of Pennsylvania, the only way in which the legality of these machines can be determined is by seizure pursuant to Section 60. It is true that after seizure, appellant may file a petition for the return of his property rather than await the citation for destruction. The state law does not afford a plain, speedy and efficient remedy without the seizure of appellant's property and the consequent destruction of his business and subjecting himself to criminal prosecution. Defensive remedies are of no assistance: *Georgia R. & Bkg. Co. v. Redwine*, 342 U. S. 299, 303, at note 11. The danger of irreparable loss is great and immediate, and properly calls for injunctive relief. *Hynes v. Grimes Packing Co.*, 337 U. S. 86.

4. The basis of the assertion of illegality made by the Attorney General of Pennsylvania against appellant's machines is that they are reconvertible to multiple coin machines of the kind outlawed by the *Trombetta* decision. Since multiple coin machines, arguendo, are illegal in Pennsylvania, and single coin machines are not, appellant contends that Section 60, as applied, contravenes the equal protection clause of the Fourteenth Amendment to the Federal Constitution, since it discriminates between machines

originally constructed as single coin machines and those converted from multiple to single coin. The Court below has not attempted to meet this issue, except to say that the fact that machines, otherwise lawful, may be converted to outlawed machines constitutes a sufficient reason for giving them differential treatment. It is respectfully submitted that this is not an adequate answer to the substantiality of the federal question raised, and that such distinction is arbitrary and unreasonable, and is not founded upon any law. Cf. *Morey v. Doud*, 354 U. S. 457. Indeed, the Court below cited no law in its support.

It may be noted that the Court below referred to the assertion of the appellees that appellant's machines carried certain non-convertible features which alone subject the machines to condemnation.[9] Appellees have filed no answer in this proceeding, and the contentions of appellant must be disposed of on the basis of the averments of the Complaint. In any event, it may be well to point out that the Attorney General relies upon *Urban's Appeal*, 148 Pa. Super. Ct. 101, for the proposition that additional features, such as the counting meters, on appellant's converted single coin machines, make the machines illegal. But this assertion is reduced to the frivolous by *Wigton's Return, supra*, which expressly held that neither free games nor counting meter attachments rendered the single coin machines involved in *Urban's Appeal* illegal, but it was the evidence, which in the opinion of the Court was adequate, that the machines were actually used for gambling (i.e., the player was paid off in cash or by goods) that resulted in the destruction of the machines. Since the assertion of illegality here is not based upon actual use or employment of the machines for gambling, this proceeding is not reducible to the non-federal question, whether appellant's machines are legal.

It is respectfully submitted that the Pennsylvania statutes, as construed and applied, are so vague and am-

biguous that it is impossible to reasonably ascertain, what qualifies as a gambling machine per se, or under what circumstances a citizen leaves himself open to criminal prosecution. Appellant will suffer irreparable harm through the seizure of his property and the destruction of his business and is subject to criminal prosecution, all without any means of relief. It is submitted that substantial federal questions are here raised.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Appellant.

APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 27472.

MICHAEL FORD,
Plaintiff,

v.

ATTORNEY GENERAL OF PENNSYLVANIA, DISTRICT ATTORNEY OF SCHUYLKILL COUNTY, SHERIFF OF SCHUYLKILL COUNTY, AND SERGEANT IN CHARGE OF PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA,
Defendants.

OPINION.

Filed May 23, 1960.

Before Biggs, *Circuit Judge* and Lord and Wood, *District Judges.*

By Biggs, *Circuit Judge.*

On December 28, 1959, the plaintiff, Ford, filed a complaint in this court alleging that the Attorney General of Pennsylvania, the District Attorney of Schuylkill County, the Sheriff of that County and the Sergeant in charge of the Pennsylvania State Troopers stationed at Mahanoy City, Pennsylvania, planned to enforce Section 60 of the

Act of March 31, 1860, P.L. 382, 18 P.S. Pa. Sec. 1445,[1] unconstitutionally and illegally against the plaintiff and to confiscate certain single-coin pinball machines owned by him and, in addition to the *in rem* proceedings just referred to, also planned to prosecute the plaintiff under Section 605 of the Act of June 24, 1939, P.L. 872, 18 P.S. Pa. Sec. 4605.[2]

1. Section 60 provides as follows:

"It shall and may be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and remove any device or machine of any kind, character or description whatsoever, used and employed for the purposes of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same. And it shall be the duty of such sheriff, constable or other officer to make return, in writing to the next court of quarter sessions of the proper county, setting forth the nature and description of the device or machine so seized upon, and the time, place and circumstances under which such seizure was made; and the said court, upon hearing the parties, if they should appear, if satisfied that such device or machine was employed and used for the purpose of unlawful gaming as aforesaid, shall adjudge the same forfeited, and order it to be publicly destroyed, and at the same time order such reasonable costs and charges to the seizing officer as they shall deem adequate and just, to be paid by the owner or possessor of such device or machine, or in case of his default, or in case he cannot be found, to be paid as costs are now by law paid upon indictments; and such adjudication shall be conclusive evidence to establish the legality of such seizure, in any court of this commonwealth, in any cause in which the legality shall arise; and in any case in which a decree of forfeiture shall not be pronounced, if said court shall, upon the evidence, be satisfied that there was probable cause for the seizure, they shall certify the same, which certificate shall be a bar to any action brought against the officer for or on account of such seizure, in those cases in which the said officer returns, or offers to return such device or machine; and in all cases shall prevent a recovery in damages, for any sum beyond the real value of the device or machine seized."

2. Section 4605, in pertinent part, provides as follows:

"Whoever sets up or establishes, or causes to be set up or established, any game or device of address, or hazard, at which money or other valuable thing may or shall be played for, or staked or betted upon; or procures, permits, suffers and allows persons to collect and assemble for the purpose of playing

The plaintiff further alleges that the confiscation and criminal proceedings are to be based upon an erroneous interpretation of a decision of the Supreme Court of Pennsylvania, 397 Pa. 430, 156 A.2d 107 (1959), affirming a decision of the Superior Court of Pennsylvania in In re Return of Trombetta, 188 Pa. Super. 480, 149 A.2d 483 (1959).

The jurisdiction of this court was invoked under Sections 1343 and 2281, Title 28, U.S.C. and the Fourteenth Amendment to the Constitution of the United States.

After a preliminary hearing this court, by a single judge, made findings of fact and a conclusion of law, and on December 30, 1959, entered a preliminary injunction restraining and enjoining the defendants from instituting legal action against the plaintiff under the Pennsylvania statute cited above. An appeal was taken to the Court of Appeals and on February 9, 1960, that Court handed down a *per curiam* opinion requiring the dissolution of the injunction, — F.2d — (1960). In the course of that opinion, the court stated: "We do not know, in the absence of authoritative pronouncement by a Pennsylvania court, whether the plaintiff's machines do violate the law of Pennsylvania. But if they do and the plaintiff claims that action by state authorities will deprive him of his constitutional rights, he must seek relief through a three-judge court provided for by the federal statutes. No such court has been constituted. We think the injunction against the defendants cannot be maintained. But we do not pass in any respect on the merits of the case." A petition for rehearing was filed with the Court of Appeals on February 16, 1960 and was denied on

---

at, and staking or betting upon such game or device of address, or hazard, for money or other valuable thing; or whoever, being the owner, tenant, lessee or occupant of any premises, leases, hires, or rents the same, or any part thereof, to be used and occupied, or employed for the purpose of playing at, or staking and betting upon such game or device of address, or hazard, for money or other valuable thing, is guilty of a misdemeanor and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars ($500.00), or undergo imprisonment not exceeding one (1) year, or both."

February 24, 1960. The mandate of the Court of Appeals was sent down to this court on March 3, 1960. On the same day the opinion of the Court of Appeals was handed down the plaintiff filed a motion in the district court requesting the appointment of a three-judge court pursuant to Sections 2281 and 2284, Title 28, U.S.C. An answer to this motion was filed by the defendant on February 12.

On February 15, in compliance with a request made on February 10, the Chief Judge of the Circuit constituted a three-judge court. The three-judge court sat on two occasions; *viz.*, on February 20th and April 7th. It was stipulated by counsel at the session of April 7th that the case might be disposed of as if on final hearing. The complaint does not charge that Section 60 of the Act of March 31, 1860 is unconstitutional but alleges rather that the defendants' interpretation is unconstitutional as applied to the plaintiff and to his converted single-coin pinball machines. The plaintiff asserts in substance that the decision in In Re Trombetta, as affirmed by the Supreme Court of Pennsylvania only doomed multiple-coin pinball machines.

The plaintiff also asserts that the threatened prosecution under Section 605 of the Act of June 24, 1939, P. L. 872, 18 P. S. Pa. Sec. 4605,[3] violates the Fourteenth Amendment in that the statute is so vague that one cannot be sure he is not violating the law.[4]

Finally, plaintiff asserts that he will be deprived of civil rights by the contemplated actions of the Attorney

3. See note 2, *supra*.

4. The plaintiff in paragraph 15 of the complaint alleges: "Plaintiff further avers that the threatened criminal proceedings under Section 605 of the Act of June 24, 1939, P. L. 872, 18 P. S., Section 4605, which holds, inter alia, that whoever sets up any game at which money or other valuable thing *may* or shall be played for is guilty of a misdemeanor, here violates the Fourteenth Amendment of the Constitution of the United States." In his brief he asserts that the statute is too vague and uncertain to meet the requirements of the Fourteenth Amendment as stated above. We conclude that under the "notice" pleading of the Federal Rules of Civil Procedure that this combination is sufficient to raise a justiciable issue.

General of Pennsylvania and by the state and county officials referred to but he neither sets forth nor can we find any provision of the Civil Rights Acts or any other acts which could afford him relief under the circumstances shown by the record.

As we read this complaint, the plaintiff's constitutional arguments relate to the two separate Pennsylvania statutes designated: one being Section 60 of the Act of March 31, 1860, under which the State plans to seize the single-coin machines of the plaintiff; the other being Section 605 of the Act of June 24, 1939, under which the State threatens to bring criminal proceedings against the plaintiff if he continues to retain his machines which the State contends are easily converted into gambling devices. To simplify matters we will deal with each statute separately as if the plaintiff had brought two, independent equity actions by separate complaints, which in substance he has.

It is well established that when a bill for a preliminary injunction to restrain the enforcement of a state statute fails to set up a substantial federal question the single judge of a district court to whom an application for a three-judge court was made may dismiss the complaint on the ground that it presents no substantial federal question, *Ex Parte* Poresky, 290 U. S. 30 (1933), and we conclude with reference to Public Law 60 of the Act of March 31, 1960 that no substantial federal question is presented on this record. The statute affords the plaintiff procedural due process of law if, as he alleges, his single-coin pinball machines are seized. Public Law 60 provides for a hearing in the Court of Quarter Sessions of the appropriate county where all issues presented can be adjudicated. The plaintiff may appeal that court's decision to the Superior Court and thence to the Supreme Court of Pennsylvania in some cases if the decision be adverse to him. See, *e.g.*, Return of Trombetta, *supra*.

Turning now to substantive due process, we again fail to see any merit in the plaintiff's contentions. It is asserted

that there is a denial of equal protection of the laws under the Fourteenth Amendment in that the plaintiff's pinball machines, converted from multiple-coin to single-coin operation, are about to be treated discriminatorily in relation to pinball machines originally constructed to receive only a single coin at a time. The parties have stipulated that the plaintiff's machines may be reconverted to unlawful multiple-coin pinball machines. Compare In Re Return of Trombetta, supra. To phrase the plaintiff's argument in another way, he asserts that it would be a denial of equal protection of the laws to outlaw single-coin machines that can be converted to multiple-coin machines, while not outlawing similar single-coin pinball machines which cannot be converted to multiple-coin operation. Under the present interpretation of the Fourteenth Amendment it is clear that the fact that the machines, otherwise lawful, may be converted to outlawed gambling devices constitutes a sufficient reason for giving them differential treatment. Furthermore, the Attorney General claims that certain non-convertible single-coin machines may also be seized and hence any claim of discrimination must be based on gross speculation. Certainly under the operative facts of the present record such an issue cannot rise to the dignity of a substantial federal question. To hold otherwise would unduly disrupt state judicial process.

We can perceive no reason why, if a three-judge court has been improvidently convened in respect to this aspect of the case and it appears that no substantial federal question is presented, as here, the three-judge court may not relinquish jurisdiction. We so hold.

We now reach Ford's allegation that Section 605 of the Act of June 24, 1939, P. L. 872, 18 P. S. Pa. Sec. 4605, is unconstitutional because of vagueness. The relevant portion of that Act makes it a crime to set up any game at which money "may or shall be played for". One may well argue that almost any game by exercise of sufficient ingenuity may

become a gambling device and that therefore this statute is too vague and indefinite to be enforced against the plaintiff.

We cannot say that this allegation does not present a substantial federal question. Moreover, it is clear that this allegation directly attacks a state statute and thus meets the requirements set out in 28 U. S. C. Sec. 2281 relating to the jurisdiction of a three-judge court.[5] But the threatened action against Ford under Section 605 clearly would be a criminal proceeding and the jurisdiction of the court to enjoin such proceedings must be determined against the background of the long standing federal policy that equity will not interfere to prevent the enforcement of a criminal statute, even though unconstitutional, unless the danger of irreparable loss is both great and immediate. Spielman Motor Sales Co. v. Dodge, 295 U. S. 89 (1935); Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925). There is no such showing here. If the plaintiff should be arrested his guilt would be tested and he would be tried by due process of law. The federal question can be set up in the state court. The criminal case against the plaintiff, if one ensues, will be an ordinary criminal prosecution. No more than a single prosecution is apparently contemplated. No multiplicity of criminal proceedings is even suggested. There is no necessity for the intervention of equity here. Cf. Harrison v. N. A. A. C. P., 360 U. S. 167, 177 (1959). It would be an abuse of discretion for this court to grant the relief sought by the plaintiff under this aspect of the case. That portion of the complaint based on Section 605 of the Act of June 24, 1939, must be dismissed for want of equity.

---

5. 28 U. S. C. Sec. 2281 provides as follows:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

If we are in error in any respect relief may be obtained by appropriate application to the Supreme Court either by way of an appeal under Section 1253, Title 28, U. S. C. or by way of mandamus. See *Ex Parte* Bransford, 310 U. S. 354 (1940). A single judge of this court may dismiss that portion of the complaint based on Section 60 of the Act of March 31, 1960, in accordance with the mandate of the Court of Appeals.

An appropriate order will be entered.

/s/ JOHN BIGGS, JR.
United States Circuit Judge
/s/ JOHN W. LORD, JR.
United States District Judge
/s/ HAROLD K. WOOD
United States District Judge

Dated: May 23, 1960.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 27,472

MICHAEL FORD,
Plaintiff,

v.

ATTORNEY GENERAL OF PENNSYLVANIA, DISTRICT ATTORNEY OF SCHUYLKILL COUNTY, SHERIFF OF SCHUYLKILL COUNTY, AND SERGEANT IN CHARGE OF PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA,
Defendants.

ORDER.

(Filed May 23, 1960)

Present: BIGGS, *Circuit Judge*, and LORD and WOOD, *District Judges.*

It is ORDERED:

(1) The order of February 15, 1960, constituting a three-judge court pursuant to Title 28, U. S. C. Sec. 2284 be and the same hereby is limited to consideration of that portion of the complaint based on Section 605 of the Act of June 24, 1939, P. L. 872, 18 P. S. Pa. Sec. 4605 and the jurisdiction of the three-judge court in respect to that portion of the complaint based on Section 60 of the Act of March 31, 1860, 18 P. S. Pa. Sec. 1445, be and the same hereby is relinquished.

(2) The portion of the complaint seeking a permanent injunction as to enforcement of the Act of June 24, 1939, Section 605, be and the same hereby is dismissed for want of equity.

(3) The temporary injunction issued by the three-judge court on February 23, 1960, be and the same hereby is vacated.

/s/ JOHN BIGGS, JR.
United States Circuit Judge
/s/ JOHN W. LORD, JR.
United States District Judge
/s/ HAROLD K. WOOD
United States District Judge

Dated: May 23, 1960.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 27,472

MICHAEL FORD,
Plaintiff,

v.

ATTORNEY GENERAL OF PENNSYLVANIA, DISTRICT ATTORNEY OF SCHUYLKILL COUNTY, SHERIFF OF SCHUYLKILL COUNTY, AND SERGEANT IN CHARGE OF PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA,
Defendants.

OPINION.

FINDINGS OF FACT.

Wood, J. December 30, 1959.

1. The issue before the Court has its origin in *In re: Return of Julius A. Trombetta, Sergeant, Pennsylvania State Police*, 188 Pa. Super. 480, and — Pa. —.

2. As a result of that case certain so-called "multiple-coin machines" have been declared illegal by the Court of Pennsylvania. From the evidence and argument before the Court it is concluded as a fact that it is intended that the decision of the Supreme Court of Pennsylvania will be ultimately tested before the Supreme Court of the United States.

3. No supersedeas has been granted nor any action taken as of now which would prevent the Attorney General of the Commonwealth of Pennsylvania from seizing the type of machines involved in the aforementioned proceeding.

4. Following final decision by the Supreme Court of Pennsylvania and within an estimated period of about two weeks plaintiff has converted multiple-coin machines which he owns to single-coin machines. (Whether or not the only difference between the machines banned by the Courts of Pennsylvania and the converted machines is restricted to single or multiple coin operation we do not determine at this time.)

5. Not later than the second day of January, 1960, if not prevented, the Attorney General and those acting under her direction and authority described in the complaint will seize the converted machines under the provisions of Section 60 of the Act of March 31, 1860, P.L. 382, 18 P.S. Section 1445, which is a criminal statute where the proceedings are *in rem* and thus immediately upon seizure deprive an owner of his property after which he may litigate his right to ownership and possession.

6. Plaintiff here in good faith converted these machines believing that they would then fall within the category of permitted pinball machines in Pennsylvania. (*Wigton's Return*, 151 Pa. Super. 337.) The converted machines have a value and are necessary to the continued operation of plaintiff's business.

7. Whether these converted machines fall in the prohibited class of the *Trombetta* case or the permissive class of *Wigton* has not been determined by any Court in Pennsylvania.

8. The possible injury to plaintiff is imminent, the legal situation is unusual and any relief available at law to the plaintiff at this time appears to be inadequate.

DISCUSSION.

The case before the Court poses a difficult problem which might have been avoided had more time been allowed the plaintiff to come within the law or to be advised ade-

quately as to what he was required to do in order that he not be considered as a violator and face the loss of his property. The Court is also aware that it is not the policy of this Court nor is it advisable for a Federal Court to interfere in the enforcement of the criminal statutes of a state. The statute in the case before us, however, and with which we are concerned, is an *in rem* proceeding, the effect of which is to immediately deprive a citizen of his property and, therefore, we feel we must give it closer observation than would otherwise be necessary. Furthermore, the Court fully recognizes the heavy obligation on the Attorney General to prevent the use of gambling machines or paraphernalia of any kind. On the other hand, we have before us a situation where a citizen which we assume acted in good faith and has tried to comply with the law and now with some two weeks notice learns that he has not and will lose his property for at least the period of litigation to prove that he is not a law violator. While the issue is not before us for a decision, great stress was laid at the argument on the fact that although these machines were single coin they were also within the prohibitions of the *Trombetta* case for other reasons. It has not been called to our attention that prior to the argument this fact was called to the attention of the alleged violator, the plaintiff.

Finally, were the Attorney General to seize these machines, as has been threatened on January 2, 1960, considerable harm and injury would come to the plaintiff whereas to enjoin that action for a limited period of time with the hope that a more satsifactory solution could be reached to this problem would neither condone the use of the machines nor work a hardship on anyone.

CONCLUSIONS OF LAW.

The Court has jurisdiction in this matter and by separate Order will deny the motion to dismiss the complaint filed *eo die* and the plaintiff is entitled to temporary relief.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,112

MICHAEL FORD

v.

ATTORNEY GENERAL OF PENNSYLVANIA; DISTRICT ATTORNEY OF SCHUYLKILL COUNTY; SHERIFF OF SCHUYLKILL COUNTY; AND SERGEANT IN CHARGE PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA.

ATTORNEY GENERAL OF PENNSYLVANIA,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 18, 1960

Before GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed February 9, 1960)

PER CURIAM

This case is before us on a motion to dissolve the preliminary injunction against the defendants granted by a judge of the Eastern District of Pennsylvania. The sub-

ject matter of the controversy is the legality of certain pinball machines belonging to the plaintiff. His position is that having converted his multiple-coin machines into single-coin machines he is not in violation of the Pennsylvania statute as construed by the Supreme Court of that state. He charges that the threatened seizure of his machines by the defendants, if carried out, will deprive him of constitutional rights. We do not know, in the absence of authoritative pronouncement by a Pennsylvania court, whether the plaintiff's machines do violate the law of Pennsylvania. But if they do and the plaintiff claims that action by the state authorities will deprive him of his constitutional rights, he must seek relief through a three-judge court provided for by the federal statutes. No such court has been constituted. We think the injunction against the defendants cannot be maintained. But we do not pass in any respect on the merits of the case.

The motion to dissolve the injunction will be granted.

APPENDIX B.

United States Constitution, Amendment XIV:

Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Act of 1860, March 31, P.L. 382, Section 60:

Officers may seize implements and arrest offenders without warrant. It shall and may be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and remove any device or machine of any kind, character or description whatsoever, used and employed for the purposes of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same. And it shall be the duty of such sheriff, constable or other officer to make return, in writing, to the next court of quarter sessions of the proper county, setting forth the nature and description of the device or machine so seized upon, and the time, place and circumstances under which such seizure was made; and the said court, upon hearing the parties, if they should appear, if satisfied that such device or machine was employed and used for the purpose of unlawful gaming as aforesaid, shall adjudge the same forfeited, and order it to be publicly destroyed, and at the same time order such reasonable costs and charges to the seizing officer as they shall deem adequate and just, to be paid by the owner or possessor of such device or machine, or in case of his default, or in case he cannot be found, to be paid as costs are now by law paid upon indictments; and such adjudication shall be conclusive evidence to establish the legality of such seizure, in

any court of this commonwealth, in any cause in which the question of its legality shall arise; and in any case in which a decree of forfeiture shall not be pronounced, if said court shall, upon the evidence, be satisfied that there was probable cause for the seizure, they shall certify the same, which certificate shall be a bar to any action brought against the officer for or on account of such seizure, in those cases in which the said officer returns, or offers to return such device or machine; and in all cases shall prevent a recovery in damages, for any sum beyond the real value of the device or machine seized. (18 P. S. Section 1445)

Act of June 24, 1939, P. L. 872, Section 605:

Establishing gambling places. Whoever sets up or establishes, or causes to be set up or established, any game or device of address, or hazard, at which money or other valuable thing may or shall be played for, or staked, or betted upon; or procures, permits, suffers and allows persons to collect and assemble for the purpose of playing at, and staking or betting upon such game or device of address, or hazard, for money or other valuable thing; or whoever, being the owner, tenant, lessee or occupant of any premises, leases, hires, or rents the same, or any part thereof, to be used and occupied, or employed for the purpose of playing at, or staking and betting upon such game or device of address, or hazard, for money or other valuable thing, is guilty of a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or undergo imprisonment not exceeding one (1) year, or both. * * * (18 P. S. Section 4605)

IN THE

Supreme Court of the United States

October Term, 1960
No. 23

MICHAEL FORD,

Plaintiff-Appellant

v.

ATTORNEY GENERAL OF PENNSYLVANIA, DISTRICT ATTORNEY OF SCHUYLKILL COUNTY, SHERIFF OF SCHUYLKILL COUNTY, AND SERGEANT IN CHARGE OF PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA,

Defendants-Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO DISMISS OR AFFIRM

FRANK P. LAWLEY, JR.
Deputy Attorney General
ANNE X. ALPERN
Attorney General
Attorneys for Appellees

Department of Justice
Commonwealth of Pennsylvania
State Capitol
Harrisburg, Pa.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa

TABLE OF CONTENTS

	Page
Motion To Dismiss or Affirm:	
Statement of Questions Involved	4
Statement of the Case	2
Argument:	
I. The District Court properly dismissed that portion of the Complaint seeking to enjoin the enforcement of a State criminal statute for want of equity	5
II. The District Court properly relinquished jurisdiction of that portion of the Complaint relating to the seizure of pinball machines as alleged gambling devices	10
Conclusion	17

TABLE OF CITATIONS

Cases:

American Legion Post No. 51 Appeal, 397 Pa. 430, 156 A. 2d 107 (1959), affirming 188 Pa. Super. Ct. 480, 189 A. 2d 483 (1959)	2
American Legion Post No. 51 v. Commonwealth of Pennsylvania, No. 881 October Term, 1959, U. S. , 28 L.W. 3367	2
Beal et al. v. Missouri Pacific Railroad Corp., 312 U. S. 45 (1941)	7
City of Houston et al. v. Jas. K. Dobbs Co. of Dallas, 232 F. 2d 428 (5th Cir., 1956)	8
Commonwealth v. Kaiser, 80 Pa. Super. Ct. 26 (1922)	10

Denton et al. v. City of Carrollton, Georgia et al., 235 F. 2d 481 (5th Cir., 1956) 8

Douglas et al. v. City of Jeanette et al., 319 U. S. 157 (1943) 8

Ford v. Attorney General et al., 274 F. 2d 820 (3d Cir., 1960) 3

Hewitt v. National Sur. Corp., 130 F. Supp. 110 (Ga., 1955) 14

Morgan v. United States, 107 F. Supp. 501 (W.D. Ky., 1952) 12, 14, 15

Rice v. Walls, 213 F. 2d 693 (6th Cir., 1954) 14

Schuettler v. Maurer et al., 159 Pa. Super. Ct. 110, 112 (1946) 11

Spielman Motor Sales Co., Inc. v. Dodge, 295 U. S. 89 (1935) 5, 6, 7

Stefanelli et al. v. Minard et al., 342 U. S. 117 (1951) 14

United States v. Korpan, 354 U. S. 271 (1957) 3

United States v. Three Gambling Devices, 161 F. Supp. 5 (W.D. Pa., 1957) 14, 15

United States v. Three Trade Boosters, 135 F. Supp. 24 (M.D. Pa., 1955) 14

Watson et al. v. Buck et al., 313 U. S. 387 (1941) 8

STATUTES:

Act of March 31, 1860, P. L. 382, 18 Purdon's Pa. Stat. Annotated, §§1445, 1446 10, 11, 15

Act of June 24, 1939, P. L. 872, Section 605, 18 Purdon's Pa. Stat. Annotated, §4605 8

The Johnson Act, 64 Stat. 1134 (1951), 15 U.S.C. 1171-1177 (1958) 11

46 Stat. 754 (1930), 19 U.S.C. 1602 et seq. (1958) 11

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1960

No.

MICHAEL FORD,
Plaintiff-Appellant

v.

ATTORNEY GENERAL OF PENNSYLVANIA, DISTRICT ATTORNEY OF SCHUYLKILL COUNTY, SHERIFF OF SCHUYLKILL COUNTY, AND SERGEANT IN CHARGE OF PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA,
Defendants-Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled case move to dismiss the appeal or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Pennsylvania on the following grounds:

1. The appeal does not present a substantial Federal question.

2. The questions on which the decision of the District Court depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

On November 24, 1959, the Supreme Court of Pennsylvania affirmed the judgment of the Pennsylvania Superior Court declaring "multiple coin pinball machines" to be gambling devices *per se*. *American Legion Post No. 51 Appeal*, 397 Pa. 430, 156 A. 2d 107 (1959), affirming 188 Pa. Superior Ct. 480, 189 A. 2d 483 (1959).

On June 20, 1960, this Court granted a Motion to Dismiss the appeal filed in that case, *sub nom, American Legion Post No. 51 v. Commonwealth of Pennsylvania*, No. 881 October Term, 1959, — U. S. — 28 L.W. 3367.

On December 28, 1959, appellant filed a complaint in the court below alleging that he owns "several" of the type pinball machines covered by the Supreme Court's decision, but had converted them to "single-coin" machines. He asked for a restraining order on the ground that, notwithstanding the alleged conversion, it was the intention of state law enforcement officers to seize his machines under the Supreme Court's decision.

The object of the machines in question is to place steel balls in numbered holes in the horizontal playing field, which numbers are reflected upon a "Bingo" type card on the vertical backboard. If three or more balls are placed in holes which "line-up" on the backboard, the player receives "free plays". The number of such plays is dependent upon the number of

balls placed in line, the odds given to him and the bonus features present in a given game. The odds, bonus features and extra balls may or may not be obtained (depending upon chance) upon the insertion of additional coins. The machines also contain a knockdown button, two or three recording meters, and a reflex unit which changes the ratio of coins necessary to obtain the extra features in proportion to the free plays registered. Adjustment plugs to increase game difficulty are also present. A detailed description of the machines operation is contained in the Superior Court's opinion (188 Pa. Superior Ct. 408); See also, *United States v. Korpan*, 354 U. S. 271.

On December 30, 1959 a single district judge, after hearing, granted a preliminary injunction. However, on appeal the Court of Appeals for the Third Circuit dissolved the injunction on the ground that the matter was one for a three-judge district court. *Ford v. Attorney General of Pennsylvania et al.*, 274 F. 2d 820 (3 Cir., 1960). Thereafter, such three-judge district court was constituted and on May 23, 1960, issued its Opinion and Order denying relief to the appellant.

A two week supersedeas was granted by the District Court to allow time for application to this Court for a supersedeas pending appeal.

Application for such supersedeas was made to the Honorable William J. Brennan, Jr., Circuit Justice for the Third Circuit, who on June 9, 1960, denied the application.

STATEMENT OF QUESTIONS INVOLVED

Where the Supreme Court of Pennsylvania has declared multiple-coin pinball machines gambling devices *per se*, and appellant possesses such illegal machines which he has converted to single-coin operation (it being conceded that his machines can be reconverted to prohibited gambling devices), are substantial questions presented on appeal to the Supreme Court of the United States which need further argument:

1. Where a District Court dismisses, for want of equity, a complaint seeking to enjoin the enforcement of a State criminal statute which makes it a misdemeanor to set up or maintain a gambling device and federal questions can be set up in an ordinary State criminal prosecution?

2. Where a District Court relinquishes jurisdiction of a complaint seeking to enjoin the enforcement of a State criminal statute, under which the legality or illegality of appellant's pinball machines can be established, and such statute affords appellant both procedural and substantive due process?

Under the above circumstances, are substantial Federal questions involved?

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DISMISSED THAT PORTION OF THE COMPLAINT SEEKING TO ENJOIN THE ENFORCEMENT OF A STATE CRIMINAL STATUTE FOR WANT OF EQUITY

Appellant sought to enjoin the enforcement of Section 605 of the Act of June 24, 1939, P. L. 872, 18 Purdon's Pa. Stat. Annotated §4605. (Appellant's Appendix A, 2a, footnote 2). This is a criminal statute making it a misdemeanor to set up or establish a gambling device.

The well established general rule is that the Federal Courts will not enjoin the enforcement of a state criminal statute even though the statute is alleged to be unconstitutional. In no case is the doctrine set forth more clearly than it was by Chief Justice Hughes in *Spielman Motor Sales Co., Inc. v. Dodge*, 295 U.S. 89, 95 (1935):

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500. See, also, In re Sawyer, 124 U.S. 200, 209-211; Davis & Farnum Manufacturing Co. v. Los Angeles, 189 U.S. 207, 217. To justify such interference there

must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. See Terrace v. Thompson, 263 U.S. 197, 214; Packard v. Banton, 264 U.S. 140, 143; Tyson v. Banton, 273 U.S. 418, 428; Cline v. Frink Dairy Co., 274 U.S. 445, 452; Ex parte Young, 209 U.S. 123, 161-162. We have said that it must appear that 'the danger of irreparable loss is both great and immediate'; otherwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged. There is ample opportunity for ultimate review by this Court of Federal questions. Fenner v. Boykin, 271 U.S. 240, 243, 244."

As the court emphasizes, in order to invoke the equitable jurisdiction of the Federal Court there must be "exceptional circumstances" and a "clear showing" that "the danger of irreparable loss is both great and immediate."

In the *Spielman* case, the plaintiff sought an injunction in the Federal District Court to enjoin the District Attorney of New York County from enforcing a New York State statute which made it a misdemeanor to violate any provision of a code of fair competition under the National Industrial Recovery Act. The United States Supreme Court, after pointing out that the plaintiff's bill merely contained "general allegations of irreparable damage" and unconstitutionality, stated:

"* * * But the bill failed to state facts sufficient to warrant such conclusions, which alone were not enough * * *" (295 U.S. at 96)

The Court then concluded that the bill:

> "* * * should have been dismissed upon the ground that it failed to state a case within the equitable jurisdiction of the District Court * * *" (295 U.S. at 97)

No evidence was presented to the District Court. It is submitted that there has been no "clear showing" on plaintiff's part to justify intervention. Here, as in the *Spielman* case, the District Court had before it only the general allegations of irreparable damage contained in the complaint. Plaintiff states that he is the owner of "several" converted multiple coin machines and that "as a result of confiscating these machines he will permanently lose the privilege of leasing them * * *: his property and business rights will be destroyed and the damage will be great and irreparable." No facts have been alleged nor proved sufficient to warrant such conclusions and under the *Spielman* holding plaintiff has failed to state a case "within the equitable jurisdiction of the District Court." (295 U.S. at 97)

The theory of the federal cases is that plaintiff must resort to his defenses in the state courts. He can there raise the pertinent federal questions and have ample opportunity to obtain review of these questions by the Supreme Court of the United States.

The principles set forth in the *Spielman* case have been followed by the Supreme Court of the United States down to the present time. For their most recent application see *Beal et al. v. Missouri Pacific Railroad Corp.*, 312 U.S. 45 (1941) (irreparable damage alleged but not found as a fact by trial court);

Watson et al. v. Buck et al., 313 U.S. 387 (1941) (mere statement by prosecuting officer that he intends to enforce state law is no proof of threatened irreparable injury); and *Douglas et al. v. City of Jeanette et al.*, 319 U.S. 157 (1943) (declared intention to institute other prosecutions not sufficient to establish irreparable injury).

In those cases where equitable jurisdiction has been successfully invoked, the showing of "irreparable damage" in no way compares to the instant situation. In effect, there must be a clear showing that the risks of imprisonment, fines and general financial burdens are such that to deny equitable relief would be tantamount to the denial of judicial review altogether. See: *Denton et al. v. City of Carrollton, Georgia et al.*, 235 F. 2d 481 (5 Cir., 1956); *City of Houston et al. v. Jas. K. Dobbs Co. of Dallas*, 232 F. 2d 428 (5 Cir., 1956).

With reference to Section 605 of the Pennsylvania Penal Code, Circuit Judge Biggs, speaking for the three-judge District Court said:[1]

> "* * * the threatened action against Ford under Section 605 clearly would be a criminal proceeding and the jurisdiction of the court to enjoin such proceedings must be determined against the background of the long standing federal policy that equity will not interfere to prevent the enforcement of a criminal statute, even though unconstitutional, unless the danger of irreparable loss is both great and immediate. Spielman Motor Sales Co. v. Dodge, 295 U.S. 89

[1] Appellant's Appendix A, 7a.

(1935); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925). There is no such showing here. If the plaintiff should be arrested his guilt would be tested and he would be tried by due process of law. The federal question can be set up in the state court. The criminal case against the plaintiff, if one ensues, will be an ordinary criminal prosecution. No more than a single prosecution is apparently contemplated. No multiplicity of criminal proceedings is even suggested. There is no necessity for the intervention of equity here. Cf. Harrison v. N. A. A. C. P., 360 U.S. 167, 177 (1959). It would be an abuse of discretion for this court to grant the relief sought by the plaintiff under this aspect of the case. That portion of the complaint based on Section 605 of the Act of June 24, 1939, must be dismissed for want of equity."

Under the circumstances it is submitted that the question presented with reference to Section 605 is so unsubstantial as not to need further argument.

II.

THE DISTRICT COURT PROPERLY RELINQUISHED JURISDICTION OF THAT PORTION OF THE COMPLAINT RELATING TO THE SEIZURE OF PINBALL MACHINES AS ALLEGED GAMBLING DEVICES

The seizure and destruction of gambling devices is authorized in Pennsylvania by Section 60 of the Act of March 31, 1860, P. L. 382, 18 Purdon's Pa. Stat. Annotated §1445.[2] Appellant sought to enjoin the enforcement of this statute after alleging that he owned "several" converted multiple coin pinball machines and that "as a result of confiscating these machines, he will permanently lose the privilege of leasing them, his property and business rights will be destroyed, and the damage will be great and irreparable."

However, the very statute in question is a complete answer to his allegations. It contemplates personal notice to the appellant upon seizure of his machines and requires a hearing at the next Quarter Sessions Court to determine whether his machines are subject to forfeiture and destruction. Permanent loss to the appellant would result only if after hearing the court is satisfied that the machines are gambling devices *per se*, in which case no property rights may be asserted. *Commonwealth v. Kaiser*, 80 Pa. Superior Ct. 26 (1922). If the Court is not satisfied, provision is

---

[2] Appellant's Appendix A, 2a, footnote 1.

made for the return of the machine and for damages in case the seizure was malicious. Further, notwithstanding the provisions of Section 61 of the same act (18 P.S. §1446) prohibiting replevin prior to an adjudication by the court as to whether the machines are gambling devices, the Superior Court of Pennsylvania has stated that the issue may be raised on petition of an owner seeking to recover possession of his property which has been seized: *Schuettler v. Maurer et al.*, 159 Pa. Superior Ct. 110, 112, 46 A. 2d 586 (1946).

It is the Commonwealth's position that this remedy is more than adequate to protect appellant from irreparable damage. *Indeed, it is far less punitive than the remedy provided by federal law where alleged gambling devices are seized by federal officers.*

Provision is made for federal seizure of gambling devices under the so-called Johnson Act, 15 U.S.C. 1171-1177. Such seizure is under the provisions of the law relating to the seizure and forfeiture of property for violation of the customs laws (15 U.S.C. 1177).

The procedures outlined in the customs laws (19 U.S.C. 1602 et seq.) authorize a non-judicial sale of property having a value of less than $2500.00 after publication of intention in a newspaper for three weeks (19 U.S.C. 1607), unless a claimant of the property files a claim within 20 days from the first publication and executes a bond in the amount of $250.00 to cover costs in the event he is unsuccessful, after which a judicial condemnation may be had (19 U.S.C. 1608). Only if the property exceeds the value of $2500.00 must judicial condemnation be instituted upon seizure (19 U.S.C. 1610).

Pennsylvania's procedure contemplates personal notice, a judicial hearing in all cases and no destruction until after a court is satisfied that the property is contraband.

The Federal Courts have denied injunctive relief where alleged gambling equipment has been seized by federal officers. In *Morgan v. United States*, 107 F. Supp. 501 (W.D. Ky., 1952), plaintiffs asked for an injunction based upon the unconstitutionality of the Johnson Act, and asked for a three-judge court; further, they requested that in the event it be found constitutional, the District Judge should adjudge that the Act did not apply to the property seized; that in either event, the machines, be restored to their respective owners; and that if they could not be returned plaintiffs be awarded compensation for their value. A motion to dismiss was filed. Circuit Judge Miller, speaking for the Court, after outlining the federal condemnation procedures under the customs laws, stated at page 504:

> "The rule appears well settled that where a statute provides for an administrative remedy a party is not entitled to injunctive relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638; Macauley v. Waterman S. S. Corp., 327 U.S. 540, 66 S. Ct. 712, 90 L. Ed. 839; Smith v. Duldner, 6 Cir., 175 F. 2d 629. The rule is applicable in the present case even though the plaintiffs' constitutional rights are alleged to be violated. Aircraft & Diesel Equipment Corp. v. Hirsch, supra, 331

U.S. 752, 67 S. Ct. 1493; Smith v. Duldner, supra, 6 Cir. 175 F. 2d 629, 631. See Dodge v. Osborn, 240 U.S. 118, 36 S. Ct. 275, 60 L. Ed. 557; Bailey v. George, 259 U.S. 16, 20, 42 S. Ct. 419, 66 L. Ed. 816. The constitutionality of the statute under which the property was seized can be made an issue in the condemnation proceedings in the District Court. United States v. Childs, D. C. 43 F. Supp. 776; United States v. One Oldsmobile Sedan, D. C. 75 F. Supp. 83, 85; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 345-346, 57 S. Ct. 816, 81 L. Ed. 1143; State of Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 133-139, 67 S. Ct. 544, 91 L. Ed. 794. Nor is the case removed from the operation of the rule because of any attack on the adequacy and constitutionality of the administrative review provided by the Act, which issues can be decided in the administrative hearing. Arrow Distilleries, Inc. v. Alexander, D. C. 24 F. Supp. 880, 882, affirmed 306 U.S. 615, 59 S. Ct. 489, 83 L. Ed. 1023; Myers v. Bethlehem Shipbuilding Corp., supra, 303 U.S. 41, 49, 58 S. Ct. 459.

"Plaintiffs' rights are thus fully protected by the administrative procedure provided by the Act, and they should be required to pursue that remedy instead of seeking injunctive relief through the pending actions. Myers v. Bethlehem Shipbuilding Corp., supra, 303 U.S. 41, 58 S. Ct. 459; Macauley v. Waterman S. S. Corp., 327 U.S. 540, 66 S. Ct. 712, 90 L. Ed. 839.

"The motions to dismiss the complaints are sustained (citing cases)."

See also: *Rice v. Walls*, 213 F. 2d 693 (6 Cir., 1954); *Hewitt v. National Sur. Corp.*, 130 F. Supp. 110 (Ga. 1955).

If the Federal Courts refuse to enjoin the enforcement of a federal law relating to forfeiture of gambling devices, there is even more reason to refuse to enjoin the enforcement of a similar state law. Mr. Justice Frankfurter said in another connection that the considerations governing the exercise of equitable jurisdiction in state matters "* * * touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States" *Stefanelli et al. v. Minard et al.*, 342 U.S. 117 (1951), where the Federal Courts refused to enjoin the use of evidence allegedly obtained by illegal means, in a pending state criminal proceeding.

We submit that Pennsylvania's law enforcement officers are entitled to the same tools as federal officers to suppress gambling, and should not be judged by a more restrictive standard than that required in federal matters. The fact that appellant will be temporarily deprived of his property pending the judicial determination is not significant. In fact, this is the Federal practice: *Morgan v. United States*, supra; *United States v. Three Trade Boosters*, 135 F. Supp. 24 (M.D. Pa. 1955); *United States v. Three Gambling Devices*, 161 F. Supp. 5 (W.D Pa. 1957).

No federal case has been found in which alleged gambling devices have been returned pending con-

demnation proceedings; nor does the time between seizure and determination appear significant in the federal cases. See *United States v. Three Gambling Devices*, supra (19 months); *Morgan v. United States*, supra (9 months).

As to the enforcement of Section 60 of the Act of March 31, 1860, P. L. 382, supra, the Court below said:[3]

> "It is well established that when a bill for a preliminary injunction to restrain the enforcement of a state statute fails to set up a substantial federal question the single judge of a district court to whom an application for a three-judge court was made may dismiss the complaint on the ground that it presents no substantial federal question, Ex Parte Poresky, 290 U.S. 30 (1933), and we conclude with reference to Public Law 60 of the Act of March 31, 1960 that no substantial federal question is presented on this record. The statute affords the plaintiff procedural due process of law if, as he alleges, his single-coin pinball machines are seized. Public Law 60 provides for a hearing in the Court of Quarter Sessions of the appropriate county where all issues presented can be adjudicated. The plaintiff may appeal that court's decision to the Superior Court and thence to the Supreme Court of Pennsylvania in some cases if the decision be adverse to him. See, e.g., Return of Trombetta, supra.
>
> "Turning now to substantive due process, we again fail to see any merit in the plaintiff's con-

[3] Appellant's Appendix A, 5a-6a.

tentions. It is asserted that there is a denial of equal protection of the laws under the Fourteenth Amendment in that the plaintiff's pinball machines, converted from multiple-coin to single-coin operation, are about to be treated discriminatorily in relation to pinball machines originally constructed to receive only a single coin at a time. The parties have stipulated that the plaintiff's machines may be reconverted to unlawful multiple-coin pinball machines. Compare In Re Return of Trombetta, supra. To phrase the plaintiff's argument in another way, he asserts that it would be a denial of equal protection of the laws to outlaw single-coin machines that can be converted to multiple-coin machines, while not outlawing similar single-coin pinball machines which cannot be converted to multiple-coin operation. Under the present interpretation of the Fourteenth Amendment it is clear that the fact that the machines, otherwise lawful, may be converted to outlawed gambling devices constitutes a sufficient reason for giving them differential treatment. Furthermore, the Attorney General claims that certain non-convertible single-coin machines may also be seized and hence any claim of discrimination must be based on gross speculation. Certainly under the operative facts of the present record such an issue cannot rise to the dignity of a substantial federal question. To hold otherwise would unduly disrupt state judicial process."

It is submitted for the foregoing reasons the Court below properly relinquished jurisdiction and the

question presented with reference to the seizure statute is so unsubstantial as not to need further argument.

CONCLUSION

For all of the foregoing reasons, appellees move that this appeal be dismissed or the judgment of the District Court affirmed.

Respectfully submitted,

FRANK P. LAWLEY, JR.
Deputy Attorney General

ANNE X. ALPERN
Attorney General
Attorneys for Appellees